Filed 2/8/10 P. v. Johnson CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. PETER PAUL JOHNSON, Defendant and Appellant.	B212562 (Los Angeles County Super. Ct. No. BA337596)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Reversed.

Syda Kosofsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Peter Paul Johnson appeals from his conviction of one count of felony resisting of an executive officer (Pen. Code, § 69).[1] Appellant's sentence was enhanced because of prior felony convictions and prison terms (§§ 1170.12, 667, 667.5). Appellant requests our review of the trial court's denial of appellant's motion for pretrial discovery made after in camera review of personnel files from the Los Angeles County Sheriff's Department. He argues that the trial court committed reversible error by failing to instruct the jury to consider misdemeanor resisting of a peace officer as a lesser included offense (§ 148, subd. (a)). Appellant also argues that the jury instruction for felony resisting was flawed, and that the trial court gave an inadequate response to a jury question.

We find that the trial court erred in not instructing the jury to consider the lesser included offense, and reverse the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Appellant was charged by information with battery on a custodial officer, Los Angeles County Sheriff's Department Deputy Roberto Ochoa (§ 243.1; count 1), and felony resisting of Deputy Ochoa by use of force and violence (§ 69; count 2). It also was alleged that appellant suffered two prior felony convictions that qualified as strikes, three prior felony convictions barring probation, and five prior prison terms.

Appellant filed a *Pitchess*[2] motion the same day he was charged, requesting discovery of the personnel files of Deputies Ochoa, Jose Saldivar, and Laticia Reynoso. The trial court granted appellant's motion and conducted an in camera hearing to review personnel material produced by the sheriff's department. It found no discoverable information.

The evidence at trial showed that appellant was an inmate at the Los Angeles Men's Central Jail. He was housed in the "8000" floor of the jail, which is part of a

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[1] All unspecified statutory references are to the Penal Code.

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

hospital section holding diabetic inmates as well as inmates on disciplinary "loss of privilege" who are in wheelchairs. Appellant testified that he used a wheelchair because he was paralyzed from the chest down and was subject to "loss of privilege." His cellmate, Curtis Brumfield, was a diabetic.

On February 1, 2008, Deputies Ochoa and Saldivar conducted a "pill call" to the inmates, delivering medication and medical supplies. Deputy Ochoa noticed candy bars, soap, and several newspapers in appellant's cell, which he believed to be contraband belonging to appellant. Deputy Ochoa asked Brumfield to exit the cell. The deputies continued distributing medication to the other inmates.

Deputies Ochoa and Saldivar returned to appellant's cell to take him to a nurses' station for medication and to remove the alleged contraband. Jail policy required that appellant be handcuffed to his wheelchair when transported outside his cell. The accounts of Deputies Ochoa and Saldivar on the one hand, and appellant on the other, differ as to what happened next. The deputies testified that appellant was in his wheelchair when they returned to the cell. They said that appellant punched Deputy Ochoa in his hip area when he tried to apply the handcuffs, and said "homie, get the fuck up off [me]." Appellant tried to hit him again, and Deputy Ochoa grabbed appellant's wrist and told him to stop resisting. After a struggle, he and Deputy Saldivar wrestled appellant to the floor of the cell. As appellant struggled to break free of his grip, Deputy Reynoso appeared and sprayed appellant's face with pepper spray. Subdued, appellant was handcuffed to his wheelchair and left in the hallway while the deputies discussed the matter with their supervisor.

Appellant claims that he was on his bed when the deputies returned, refused to get into his wheelchair when asked, and yelled out for a sergeant because he feared Deputy Ochoa. He said that he grabbed onto his bed frame as Deputy Ochoa tried to pull him toward the door, and did not hit or attempt to hit Deputy Ochoa or the other deputies. He testified that Deputy Ochoa dragged him to the floor, where he curled up in a fetal position while Deputy Ochoa struck him repeatedly with a closed fist and sprayed him with pepper spray.

Brumfield testified that during the incident he could hear appellant yelling out for a sergeant, and heard nothing to indicate that he was resisting or battering the deputies. An inmate in a nearby cell testified that he heard appellant say he wanted to see a sergeant, call for help, and ask "why are you beating me." He did not hear the deputies tell appellant to stop resisting.

After trial, the jury requested a readback of testimony from the deputies, appellant, and Brumfield. It deadlocked as to both counts and asked the court for clarification of applicable law as to count 2 (resisting an executive officer). The jury remained deadlocked as to count 1 (battery of a custodial officer), and the court declared a mistrial as to that count. The jury returned a guilty verdict as to count 2. At a subsequent sentencing hearing, the prosecution dismissed one of the two strike allegations. The court imposed sentence for the current case and a prior case. For the current case, appellant received an eight month term (one-third of the midterm) doubled to 16 months because of the prior strike, plus three years for three of the prior prison term allegations, for a total sentence of 52 months. Appellant timely appeals from the judgment.

DISCUSSION

I

Appellant requests that we review the sealed transcript of in camera proceedings where the trial court decided not to disclose information from sheriff department personnel files. Before trial, appellant filed a motion seeking discovery of the personnel records of Deputies Ochoa, Saldivar, and Reynoso pursuant to *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531, for accusations of "excessive force, bias, dishonesty, coercive conduct or acts constituting a violation of the statutory or constitutional rights of others." (Fns. omitted.) The trial court conducted an in camera review of sheriff's department records for accusations of pertinent information. Determining that no discoverable information existed, it denied appellant's motion. Appellant requests that we review the sealed record of the trial court's *Pitchess* review to determine whether the trial court abused its discretion by failing to order disclosure of information.

Trial courts are vested with broad discretion when ruling on motions to discover peace officer records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.) We review a trial court's ruling for abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228; *People v. Hughes* (2002) 27 Cal.4th 287, 330.) We have reviewed the sealed transcript of the in camera hearing. That transcript constitutes an adequate record of the trial court's review of any document(s) provided to it, and reveals no abuse of discretion. (See *People v. Mooc*, *supra*, 26 Cal.4th at p. 1231.)

II

Appellant argues that the trial court committed reversible error by not instructing the jury to consider the misdemeanor charge of resisting a peace officer (§ 148, subd. (a)(1)) as a lesser-included offense of resisting an executive officer. (§ 69.) Section 69 "sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.) Section 148, subdivision (a)(1) provides in part: "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty" has committed a punishable offense. "[S]ection 148(a)(1) is a lesser included offense of the second type of offense in section 69." (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 257.)

An erroneous failure to instruct on a lesser-included offense constitutes a denial of a defendant's right under the California constitution to have the jury determine every material issue presented by the evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 645-646.) A trial court must instruct on lesser-included offenses, even in the absence of a defense request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present. (*Ibid.*) Substantial evidence is "evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) """Doubts as to the sufficiency of the evidence to warrant

instructions should be resolved in favor of the accused." [Citation.]'" (*People v. Petznick* (2003) 114 Cal.App.4th 663, 677.) In determining whether evidence is substantial, we determine "'only its bare legal sufficiency, not its weight.'" (*People v. Hayes* (2006) 142 Cal.App.4th 175, 181.) We review de novo the failure of a trial court to instruct on an uncharged offense that was assertedly lesser than, and included in, a charged offense. (*Ibid.*)

As we have discussed, two versions of the events were presented to the jury. Deputy Ochoa testified that appellant resisted him with force, while appellant claimed that he held onto the bedpost, and curled "in a fetal position." Appellant's cellmate and an inmate held in a neighboring cell corroborated appellant's account. Based on this testimony, there was an evidentiary basis for instruction on section 148, subdivision (a)(1) "because there were different versions of how the incident occurred, such that the jury might have found that appellant violated section 148(a)(1) and not section 69, if it had been given section 148(a)(1) as an option." (*People v. Lacefield*, *supra*, 157 Cal.App.4th at p. 260.) "The section 69 offense specifies unlawful resistance with 'force or violence,' while section 148(a)(1) can be violated without force, since it punishes a person who 'willfully resist[ed], delay[ed], or obstruct[ed].'" (*Id.* at p. 257.) The deputies testified that appellant engaged in forceful and violent resistance, while appellant denied striking Deputy Ochoa or using force. "The jurors were entitled to accept or reject all of the testimony, or a portion of the testimony" of the witnesses. (*Id.* at p. 261.) "They might have believed part of what the officers said and part of what the defense witnesses said. They therefore might have found that appellant acted unlawfully . . . but he did not use force unlawfully." (*Ibid.*)

Citing *People v. Carrasco* (2008) 163 Cal.App.4th 978 (*Carrasco*), respondent argues that that "[e]ither appellant battered Deputy Ochoa and struggled with the deputies while in the wheelchair and later on the ground, or he was, during this time, not resisting at all . . . . [¶] [N]o middle ground is available to warrant an instruction on non-violent no-force resistance." In *Carrasco*, the reviewing court found no error in the trial court's failure to instruct on section 148, subdivision (a) because "if appellant resisted the

officers at all, he did so forcefully, thereby ensuring no reasonable jury could have concluded he violated section 148, subdivision (a)(1) but not section 69." (*Carrasco*, *supra*, 163 Cal.App.4th at p. 985.) Here, appellant testified that he held onto the bedpost as Deputy Ochoa tried to remove him from his cell, and went into a fetal position when he was dragged off his bed.[3] He said he did not hit or attempt to hit the deputies. These actions qualify as willful resistance without the use of force pursuant to section 148, subdivision (a)(1). Because there was substantial evidence supporting an instruction on section 148, subdivision (a)(1) as a lesser-included offense of appellant's alleged violation of the second type of offense in section 69, the trial court erred.

We review an error in failing to instruct on a lesser-included offense to determine whether there is a reasonable probability that a result more favorable to the appellant would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Breverman* (1998) 19 Cal.4th 142, 177-178.) The evidence of appellant's guilt was not uncontested or overwhelming. Each side presented plausible versions of the incident. While deliberating, the jury requested the readback of portions of the testimony from the deputies, appellant, and Brumfield. That request "verifies the closeness of the case." (*People v. Lacefield*, *supra*, 157 Cal.App.4th at p. 262.) The jury deadlocked as to both counts, and requested clarification of the applicable law concerning count 2. It remained deadlocked as to count 1, and returned a guilty verdict as to count 2. "[T]he jury was given no alternative other than a not guilty verdict if it believed that appellant's initial resistance was unlawful, but there was no unlawful use of force. The absence of an instruction on section 148(a)(1) forced 'an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other.' [Citation.]" (*Ibid.*) It is reasonably probable that appellant would have obtained a more

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[3] Respondent contends that appellant's effort at grabbing onto a bedpost was a separate uncharged incident from the alleged assault of Deputy Ochoa. The information made no such distinction.

favorable outcome if there had been an instruction on section 148, subdivision (a)(1) as a lesser included offense.[4]

DISPOSITION

The judgment is reversed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.

[4] Because we reverse the judgment for the failure to instruct on the lesser-included offense, we do not address appellant's other arguments.